Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Shareholders of Hispanic Broadcasting Corporation (Transferor) and Univision Communications, Inc. (Transferee) For Transfer of Control of Hispanic Broadcasting Corporation, and Certain Subsidiaries, Licensees of KGBT(AM), Harlingen, TX *et al.*	)))))))))))))))))	File Nos. BTC, BTCH, BTCFTB-20020723ABL-ADS, and BTCH-20021125ABD-ABH MB Docket No. 02-235

MEMORANDUM OPINION AND ORDER

Adopted: September 8, 2003 **Released: September 22, 2003**

By the Commission: Commissioners Copps and Adelstein dissenting and issuing a joint statement.

I. INTRODUCTION

1. The Commission has under consideration applications for consent to transfer control of licensee subsidiaries ~~holding~~ 62 ~~full~~-service radio station licenses (16 AM and 41 FM) and ~~3 FM~~ translator licenses from the current shareholders of Hispanic Broadcasting Corporation (HBC) to Univision Communications, Inc. (Univision).[1] Univision and its subsidiaries own or control 32 full-

[1] A list of the stations to be transferred is attached as an appendix. After filing the instant applications, a wholly owned subsidiary acquired the following additional broadcast radio stations: KIOT(FM), Los Lunas, NM; KVVF(FM), Rio Rancho, NM; KJFA(FM), Albuquerque, NM; and KAJZ(FM) and KKSS(FM), Santa Fe, NM. On November 25, 2002, applications to transfer control of these stations to Univision Communications, Inc. were filed. See File Nos. BTCH-20021125ABD-ABH. These applications are included in the appendix and addressed in the instant order.

On February 24, March 7, and March 24, 2003, alternative sets of applications were filed seeking consent to assign and/or transfer control of the following 6 full service radio stations to either HBC as controlled by its current shareholders or to HBC as controlled by Univision: WKAQ(AM) and WKAQ-FM, San Juan, PR; WUKQ(AM), Ponce, PR; WUKQ-FM, Mayaguez, PR; KNGT(FM), Jackson, CA; and KINV(FM), Georgetown, TX. Alternative sets of applications were also filed for 3 booster stations. On May 30, 2003, the staff granted the applications naming HBC as currently controlled, and dismissed those applications naming HBC as controlled by Univision. See File Nos. BALH-20030324ADI, BALH-20030307ADZ, BTC-20030224ACH, BTCH-20030224ACI, BTC-20030223ACJ, and BTCH-20030224ACK. The applications were on public notice for more than 30 days.

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service television licenses and a number of low-power television and translator licenses, but no radio station licenses.[2] Univision also has an interest in Entravision Communications Corporation (Entravision), which owns and controls 18 full-service television and 52 full-service radio licenses.[3] The National Hispanic Policy Institute (NHPI) has filed a Petition to Deny the applications, challenging the existing ownership structure of HBC and the proposed ownership structure of the post-merger Univision. Elgin FM Limited Partnership (Elgin) has filed an informal objection contending, among other things, that the transaction will result in a Spanish-language media monopoly.[4] Several amendments to the applications, as well as various oppositions, responsive pleadings and *ex parte* letters and comments have been filed.[5] By this *Memorandum Opinion and Order*, we deny the Petition to Deny and informal objection to the extent set forth herein and grant the applications for transfer of control, subject to the conditions set forth below.[6]

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The applicants have subsequently filed an amendment requesting that these 6 full-service and 3 booster stations be added to the stations under review in the instant proceeding. Because the public has had 30 days to review the qualifications of both Univision and HBC within the context of the dismissed applications, during which time no petitions or pleadings have been filed challenging Univision's qualifications, we will include these full-service a booster stations in the instant Memorandum Opinion and Order as authorizations to be transferred. The amendm t is being treated as a minor amendment since it does not propose additional changes to the ownership structure of HBC, other than the changes already proposed in the July 23, 2002 filing. See 45 C.F.R. § 73.3578(b); Shareholders of American Radio Systems Corporation, 13 FCC Rcd 12,430, n. 1 and 3 (1998). For reference purposes only in the Commission's Broadcast Radio and Television System database (CDBS), we have assigned file numbers to these authorizations, included these authorizations in the appendix, and have addressed them in the instant order.

[2] Since filing the applications, Univision has acquired the license for KPXF(TV), Porterville, CA, and KTFQ(TV), Albuquerque, NM, and applications to acquire the licenses for KXGR(TV), Green Valley, AZ, and KFTL(TV), Stockton, CA remain pending. See File Nos. BAPCT-20020730ABO, BALCT-20030313BCD, BAPCT-20020109AAR, and BALCT-20030429AAK. Univision has also filed an application for a new television station on Channel 52 at Blanco, TX, which is also pending.

[3] Including low-power television stations, Class A television stations, and television translators, Entravision owns or controls approximately 49 television authorizations.

[4] HBC challenges NHPI's standing, arguing that it does not exist as a legal entity. NHPI, however, filed a petition to deny in *Shareholders of AMFM, Inc*, in which the Commission concluded that NHPI did have legal standing. *See Shareholders of AMFM, Inc.*, 15 FCC Rcd 16062, 16077 (2000). NHPI has also attached the affidavit of New York State Senator Efrain Gonzales, President of NHPI, who states that he resides within the service area of one of HBC's stations, to which he listens regularly. This showing is sufficient to demonstrate standing. *Office of Communications for the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Chet-5 Broadcasting, L.P.*, 14 FCC Rcd 13041 (1999). Elgin's letter, though styled as a "Petition to Deny," does not meet the pleading requirements of Section 309(d)(1) of the Communications Act and, therefore, will be considered an informal objection pursuant to Section 73.3587 of the Commission's rules. 47 U.S.C. § 309(d)(1); 47 C.F.R. § 73.3587.

[5] Spanish Broadcasting System, Inc. (SBS) has made numerous oral presentations to Commission staff and, in connection with the presentation, has filed numerous written exhibits that have been made part of the record. We have considered all written and oral *ex parte* presentations in reaching this decision.

[6] By Public Notices dated August 16, 2002 and August 26, 2002, respectively, the Media Bureau docketed the proceeding under MB Docket No. 02-235 and announced permit-but-disclose *ex parte* status. *Media Bureau Announces Assignment of Docket No. to Proceeding Involving Hispanic Broadcasting Corporation and Univision Communications, Inc.*, DA 02-2026 (MB 2002); *Media Bureau Announces Permit-But-Disclose Ex Parte Status to Proceeding Involving Hispanic Broadcasting Corporation and Univision Communications, Inc.*, DA 02-2082 (MB
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II. BACKGROUND

2. The applicants propose a merger whereby Univision will create an acquisition subsidiary, Univision Acquisition Corporation, solely for the purpose of merging with HBC. Once the merger is complete, Univision Acquisition Corporation will cease to exist, and HBC will remain as the wholly owned subsidiary of Univision. As a result of the merger, each share of HBC Class A voting stock and each share of Class B nonvoting stock will be exchanged for .85 shares of Univision Class A voting stock.[7] Total consideration for the merger is approximately $3.5 billion.

3. HBC's Class A voting stock is publicly traded. The Tichenor Family, as a result of the Tichenor Family Voting Agreement, retains the largest voting interest with 15.8% of HBC voting stock. McHenry Tichenor is HBC's President and Chairman of the Board of Directors, and holds an approximately 3.8% voting interest in HBC. Clear Channel Communications (Clear Channel), which owns or controls approximately 1200 full-service broadcast radio stations and 38 full-service broadcast television stations, currently holds all of HBC's Class B nonvoting stock, constituting 26% of its total equity. This nonvoting stock interest can be converted into a voting stock interest only upon the prior consent of the Commission. As discussed in further detail below, by this merger Clear Channel will convert its nonvoting stock interest in HBC into a 3.66% voting stock interest in Univision.

4. Univision is a publicly-traded company. A. Jerrold Perenchio is the single-majority voting shareholder by virtue of the fact that his Class P common stock is entitled to 10 votes per share so long as he continues to own at least 30% of the shares he held on October 2, 1996.[8] Univision certifies that Perenchio will have a 57% voting interest in the merged entity.[9]

5. At the time the applications were filed, Univision held a 9.86% voting stock interest in Entravision. Univision also owns all of Entravision's Class C nonvoting stock, which carries with it the right to designate two members to the Entravision Board of Directors. In the instant transfer of control application, Univision states that "[p]rior to consummation of the transaction proposed herein … the

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2002). The Commission subsequently released an Order to govern procedures for the consideration of potential confidential information. *Order Adopting Protective Order in Proceeding Involving Hispanic Broadcasting Corporation and Univision Communications, Inc.*, DA 02-3227 (rel. Nov. 22, 2002). The parties have also filed with the U.S. Department of Justice a letter waiving the confidentiality provisions of the Hart-Scott-Rodino Antitrust Improvements Act, the Antitrust Civil Process Act, and any other applicable confidentiality provisions, to allow the Department of Justice to discuss the parties' confidential information with Commission personnel and to allow Commission personnel to review the parties' confidential documents. Letter from Scott Flick and Roy Russo to John Filippini, Esq., U.S. Department of Justice (Nov. 22, 2002).

[7] HBC and Univision stock par values are $.001 and $.01, respectively. The agreement provides for an alternate mechanism under certain circumstances, whereby each share of HBC Class B nonvoting stock will be converted into Univision Class B nonvoting stock. *See* Applications for Transfer of Control, Exhibit 5, n.2. Under this alternate mechanism, Univision Acquisition Corporation will remain as a subsidiary and HBC will cease to exist.

[8] Equity and voting interests held by foreign entities in Univision comply with the alien ownership restrictions set forth in Section 310(b)(4) of the Communications Act, as determined previously by the Commission. *Univision Holdings, Inc.*, 7 FCC Rcd 6672, 6673-6674 (1992).

[9] Applications for Transfer of Control, Exhibit 16, at 1.

[Univision] interest will be converted to a non-voting, non-attributable stock interest."[10]

6. On March 26, 2003, the U.S. Department of Justice (DOJ) filed a Complaint for Injunctive Relief and proposed Consent Decree with the U.S. District Court for the District of Columbia.[11] As set forth in the proposed Consent Decree, the DOJ stated that it would not oppose the merger of Univision and HBC, if (a) Univision's interest in Entravision is converted to a new class of Entravision nonvoting stock with no rights to designate members or otherwise influence the Entravision Board of Directors; (b) Univision's total equity interest in Entravision is reduced to 15% of total equity (both voting and nonvoting) in 3 years, and 10% of total equity (both voting and nonvoting) in 6 years; and (c) certain proposed nonvoting shareholder approval rights associated with the new class of nonvoting stock are removed. The DOJ has also set forth specific provisions meant to further ensure that Univision is insulated from participating in Entravision's radio business.

III. DISCUSSION

A Radio/Television Cross-Ownership Rule

7. As a result of common control of Univision's and HBC's licenses, new radio/television combinations will be created in Phoenix, AZ (1 tv and 2 radio); Hanford, CA (1 tv and 1 radio); Los Angeles, CA (2 tv and 5 radio); Miami, FL (2 tv and 4 radio); Chicago, IL (2 tv and 3 radio); New York, NY (2 tv and 2 radio); Austin, TX (1 tv and 1 radio), Dallas-Ft. Worth, TX (2 tv and 5 radio), Houston-Galveston, TX (2 tv and 5 radio); San Antonio, TX (1 tv and 6 radio); and Waco-Temple-Bryan, TX (1 tv and 1 radio).[12] The San Francisco-San Jose, CA market will contain 3 separate radio/television combinations implicating the radio/television cross-ownership rule, 2 in the San Francisco radio metro market (2 tv and 1 radio, and 1 tv and 2 radio) and 1 in the San Jose radio metro market (1 tv and 1 radio).[13]

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[10] Id.

[11] *United States of America v. Univision Communications, Inc. and Hispanic Broadcasting Corporation*, Civil Action No. 03-0758 (Mar. 26, 2003). We refer to the related Complaint for Injunctive Relief, Consent Decree, and Final Judgment as "Consent Decree" herein. Most of the substantive provisions of the Consent Decree for purposes of the instant order are contained in the Final Judgment, and all cites contained in this order refer to this document.

[12] The combinations listed in Univision's showing assume that Univision will not have an attributable interest in Entravision after consummation of the merger. We discuss the relationship between Univision and Entravision below.

[13] Where a resulting combination contains stations in more than one Arbitron radio metro market, the voice count prong of the radio/television cross-ownership rule must be satisfied in each market. *Review of the Commission's Regulations Governing Television Broadcasting ("Television Ownership Order")*, 14 FCC Rcd 12903, 12952 n.173 (1999). Included as "voices" are those radio stations located outside a radio metro market, but with a "reportable share" in the market. *Id.* at 12951. "We generally do not count radio stations located in one Arbitron radio market towards the limits on the number of radio stations a party may own in another Arbitron radio market, even when the radio stations in the different markets fall within the Grade A contour of a commonly owned TV station." *Review of the Commission's Regulations Governing Television Broadcasting, Memorandum Opinion and Second Order on Reconsideration ("Television Ownership Reconsideration")*, 16 FCC Rcd 1067, 1081 (2000). However, the Commission will count radio stations in different Arbitron markets towards the limit that an entity may own if the radio station's relevant contour triggers the rule. *Id.*

8. The current radio/television cross-ownership rule is implicated when the Grade A contour of a television station encompasses the entire community of license of a commonly owned AM or FM radio station, or when the 2 mV/m contour of an AM radio station, or the 1 mV/m contour of an FM radio station, encompasses the entire community of license of a commonly owned television station.[14] Under the numerical ownership/voice count restrictions of the radio/television cross-ownership rule, a party may own 1 television station and up to 6 radio stations in any market where at least 20 independently owned media voices remain in the market after the proposed transaction.[15] If, under the Commission's local television ownership rule, a single entity could own 2 television stations in the market, it may hold either 2 television and up to 6 radio stations or 1 television and 7 radio stations in that market.[16] Second, a party may own 1 television station and up to 4 radio stations in any market where at least 10 independently owned media voices remain in the market after the proposed transaction.[17] Third, a party may own 1 television station and 1 radio station regardless of the number of independent voices remaining in the market.[18]

9. Univision claims that in each of the local markets at issue the proposed combinations will comply with the voice count/numerical ownership restrictions of the radio/television cross-ownership rule. This claim, however, assumes that neither Univision's interest in Entravision's radio stations nor Clear Channel's interest in HBC is cognizable under our rules. Attribution of Univision's interest in Entravision's radio stations or Clear Channel's interest in Univision would result in new radio/television combinations violating the voice count/numerical ownership restrictions of the radio/television cross-ownership rule in multiple markets as well as possibly implicate the local broadcast radio multiple ownership rule.[19] As discussed below, we conclude that Univision's interest in Entravision's radio stations after the merger will be nonattributable, subject to the representations made by Univision in its applications and related amendments, and that Clear Channel's interest in Univision after the merger will also be nonattributable. Accordingly, based on Univision's representation regarding its proposed interest in Entravision, the applications will comply with the radio/television cross-ownership rule.[20]

B Radio Multiple Ownership Rule

[14] 47 C.F.R. § 73.3555(c)(i) and (ii).

[15] Id. § 73.3555(c)(2)(i)(A).

[16] Id. § 73.3555(c)(2)(i)(B).

[17] Id. § 73.3555(c)(2)(ii). A party may also own 2 television and 4 radio stations where permitted by the local television ownership rule.

[18] Id. § 73.3555(c)(2). A party may also own 2 television and 1 radio stations where permitted by the local television ownership rule.

[19] As a result of the attributable relationship between Univision and Entravision's television stations, new tv/radio combinations will be created in Las Vegas, NV (1 tv and 3 radio); El Paso, TX (2 tv and 3 radio); Albuquerque, NM (2 tv and 5 radio); Harlingen-Westlaco-McAllen-Brownsville, TX (1 tv and 3 radio); and Monterey-Salinas (1 tv and 1 radio). All of these combinations meet the voice count/numerical restrictions of the radio/television cross-ownership rule. Attribution of Univision's interest in only Entravision's television stations will not violate the local broadcast television multiple ownership rule.

[20] Assuming both Univision's interest in Entravision's radio stations and Clear Channel's interest in Univision will be nonattributable, the merger will result in no new radio station combinations.

10. On July 2, 2003, the Commission released the *2002 Biennial Review Order*, completing a comprehensive review of the previous broadcast multiple and cross-ownership rules.[21] In the *2002 Biennial Review Order*, the Commission stated that it would retain the numerical ownership tiers of the previous radio multiple ownership rule,[22] but that the "current contour-overlap methodology for defining radio markets and counting stations in the market is flawed as a means to protect competition in local markets," and that "the current rule improperly ignores competition from noncommercial radio stations in local markets."[23] The Commission replaced the previous signal contour method for defining a local radio market with a new method based on the Arbitron radio metro market, and decided to count noncommercial radio stations in the market.[24] For purposes of determining compliance with the numerical ownership tiers of the broadcast radio multiple ownership rule, the Commission stated that it "will count as being in an Arbitron Metro above-the-line radio stations (i.e., stations that are listed as 'home' to that Metro), as determined by BIA," and "will also include in the market any other licensed full power commercial or noncommercial radio station whose community of license is located within the Metro's geographic boundary."[25] The Commission further stated that it would grandfather existing radio station combinations, but would require applicants to show compliance with the radio multiple ownership rule upon transfer of the combination, unless the buyer of the combination is a small business as defined by the *2002 Biennial Review Order*.[26]

11. The effective date of the rule changes contained in the *2002 Biennial Review Order* was subsequently stayed by order of the 3rd Circuit Court of Appeals on September 3, 2003. In the order, the Court stated that the "the prior ownership rules [will] remain in effect pending resolution of these proceedings."[27] While the new rules are not yet effective, it appears upon a review of the BIA Media Access Pro database that the applications would not be grantable once the new rules do take effect. We find, in particular, that in the Houston-Galveston, TX, radio metro market, which contains more than 45 radio stations, Univision will control a 6 FM/1 AM combination. Univision, therefore, would own 1 more FM than would be permissible under our new rules. Likewise, in the Albuquerque, NM, radio metro market, which contains only 43 radio stations, Univision will control a 5 FM combination, also 1 in excess of the amount that would be permissible. Having found the previous methodology for defining radio markets not to be in the public interest, we believe it would not be in the public interest to grant an application that would not comply with the radio multiple ownership rule once the new methodology is

[21] *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, FCC 03-127 (released July 2, 2003) (*2002 Biennial Review Order*).

[22] *Id.* at ¶ 288. Under the numerical ownership tiers, a company may own (a) 8 radio stations, only 5 of which are in the same class, in markets with 45 or more radio stations; (b) 7 stations, only 4 of which may be in the same class, in markets with 30-44 radio stations; (c) 6 radio stations, only 4 of which are in the same class, in markets with 15-29 radio stations; and (d) 5 radio stations, only 3 of which are in the same class, in markets with 14 or fewer radio stations. *See Id.* at ¶ 236.

[23] *Id.* at ¶ 239.

[24] *Id.*

[25] *Id.* at ¶ 280.

[26] *Id.* at ¶ 487, 488.

[27] *Prometheus Radio Project v. Federal Communications Commission*, No. 03-3388 (3d Cir. Sept. 3, 2003) (per curiam).

applied. Absent the ability to condition upon compliance with our new rules, we would exercise our discretion not to act on the applications until the new rules become effective. Accordingly, we approve the acquisition on the condition that the merged firm divest the radio stations in Albuquerque and Houston, or otherwise show that waiver of the rule is appropriate, within six months in the event that the stay pending appeal in *Prometheus Radio Project v. Federal Communications Commission*, No. 03-3388 (3d Cir. Sept. 3, 2003) (per curiam) is lifted or the local radio ownership rules adopted in the *2002 Biennial Review Order* otherwise go into effect.

C NHPI Petition to Deny

12. NHPI requests that the Commission designate the applications for hearing in order to explore the relationships between Clear Channel, HBC, Univision, and Entravision.[28] According to NHPI, the merger is not limited to Univision and HBC, but includes both Clear Channel and Entravision.[29] NHPI argues that the proposed ownership structure is a sham, intended to comply, on paper, with the multiple ownership rules,[30] but that the post-merger ownership structure does not reflect how Univision will actually be operated. NHPI maintains that Clear Channel will have influence in the post-merger Univision exceeding its financial interest, and that Univision will continue to significantly influence Entravision after the merger. NHPI therefore requests that the Commission consider all Clear Channel and Entravision stations in determining compliance with the multiple and cross ownership rules. For the reasons set forth below, we deny this request in part, concluding that Clear Channel does not have an attributable interest in HBC, and will not have an attributable interest in Univision after the merger; and that NHPI has failed to raise a substantial and material question of fact concerning whether Clear Channel has, or will, exercise *de facto* control over either HBC or Univision. We further conclude that Univision will not have an attributable interest in Entravision's radio stations after consummation of the proposed transaction, but that Univision's relationship with Entravision's television stations after the merger will be attributable.

1 Clear Channel

(a) *Attribution*

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[28] NHPI also requests that *all* of Clear Channel's authorizations be designated for hearing in order to determine whether Clear Channel has "undisclosed ownership interests in various radio stations and has concealed this information from the Commission." NHPI Reply at 16. For the reasons set forth herein, we conclude that the record does not justify designating Clear Channel's authorizations for hearing.

[29] SBS made an identical argument in a September 30, 2002, presentation to Commission staff.

[30] NHPI contends that "[w]here there is a basis in the record for inferring that non-voting shareholders will exercise influence or control of an ongoing business, the Commission has consistently discredited these types of sham applications." NHPI Petition to Deny at 20. The cases cited by NHPI in support of this proposition, however, involved issues particular to comparative proceedings and do not, therefore, govern our consideration of the ownership structure here. *See, e.g., Kist Corp.*, 102 F.C.C.2d 288, 290 (1985) (financial investment is not "necessarily an ownership interest creditable for integration purposes" in determining comparative merits of applicant). More importantly, the cited cases predate the *Attribution Order*, which adopted new, bright-line attribution standards. *Review of the Commission's Regulations Governing Attribution of Broadcast Interests (Attribution Order)*, 14 FCC Rcd 12559 (1999), *recon. granted in part (Attribution Reconsideration)*, 16 FCC Rcd 1097 (2001).

13. HBC was formed by the merger of Heftel Broadcasting Corporation (Heftel) and Tichenor Media Systems (Tichenor) on February 14, 1997.[31] As noted above, Clear Channel currently has a 26% nonvoting equity interest in HBC, which is convertible to a voting interest only upon prior consent of the Commission.[32] Clear Channel also has the right to approve certain extraordinary corporate actions.[33] Most recently, in *Shareholders of AMFM, Inc.*, the Commission held that Clear Channel's interest in HBC was nonattributable and that, despite NHPI's claims to the contrary, Clear Channel's right to approve these fundamental corporate actions were "permissible investor protections that neither restrict a corporation's discretion or rise to the level of attributable influence."[34] Clear Channel has not entered into any new financial or contractual relationship with HBC that would warrant revisiting the holding of *Shareholders of AMFM, Inc.*

14. With respect to Clear Channel's proposed future interest in Univision, Univision and HBC intend to convert Clear Channel's nonvoting interest in HBC into a voting interest in the post-merger Univision. In an August 30, 2002, amendment, Univision certified that Clear Channel will have a 3.66% voting stock interest in Univision following the merger. This voting interest falls below the 5% threshold set forth in the Commission's rules and is, therefore, a nonattributable voting interest.[35] The combination of total debt and equity held by Clear Channel will also comply with the 33% threshold set forth in the Equity/Debt Plus (EDP) attribution standard. Under EDP, when an investor either (1) supplies over 15% of a station's total weekly broadcast programming hours, or (2) is a same-market media entity subject to the broadcast multiple ownership rules, its interest in the licensee or other media entity in that market will be attributable if that interest, aggregating both debt and equity, exceeds 33% of the total asset value of the licensee or media entity.[36] Clear Channel certifies that the combined debt and equity it would hold in Univision would not exceed 33% of Univision's total asset value, and NHPI has provided no information calling this certification into question.

15. Rather than applying the EDP attribution standard in this case, NHPI appears to argue that EDP is inadequate as both a measure of Clear Channel's current influence over HBC and its potential influence over Univision. We disagree. The Commission created the EDP attribution standard to address the kind of influence alleged here, namely, multiple contractual arrangements and relationships that confer a cognizable level of influence for purposes of our multiple and cross-ownership rules.[37] To the extent that NHPI argues that we should disregard or alter our EDP Rule in this case, we decline to do so.

[31] Prior to merger with Tichenor, Clear Channel held both *de jure* and *de facto* control over Heftel. Following the merger, however, Clear Channel converted its voting stock interest in Heftel into a nonvoting stock interest in the newly formed HBC. The conversion of Clear Channel's interest was approved in a January 1997 Letter from Stuart B. Bedell, Assistant Chief, Audio Services Division, to Roy Russo, Esq. (Jan. 13, 1997).

[32] *See Shareholders of AMFM, Inc.*, 15 FCC Rcd at 16078.

[33] Clear Channel's prior approval is necessary before: (1) sale or transfer of all or substantially all of HBC's assets or a merger with another entity; (2) issuance of shares of preferred stock; (3) amendment of the certificate of incorporation under certain circumstances; (4) declaration or payment of non-cash dividends or distributions; or (5) amendment to those provisions in the articles of incorporation concerning the corporation's capital stock.

[34] *Shareholders of AMFM, Inc.*, 15 FCC Rcd at 16078.

[35] 47 C.F.R. § 73.3555, Note 2(a).

[36] Id. § 73.3555, Note 2(i).

[37] *Attribution Order*, 12 FCC Rcd at 12580.

It has long been Commission practice to make decisions that "alter fundamental components of broadly applicable regulatory schemes in the context of rule making proceedings, not adjudications."[38] NHPI has further failed to raise a substantial and material question of fact concerning any other relationship that would be relevant in determining whether Clear Channel has a cognizable level of influence over HBC.

16. NHPI, in particular, argues that Clear Channel's attributable influence over HBC is demonstrated by the allegations raised in an Amended Complaint filed by Spanish Broadcasting Systems, Inc. (SBS), in a lawsuit before the U.S. District Court for the Southern District of Florida, which NHPI has attached to the petition. Though the Amended Complaint relates mostly to Clear Channel's alleged anticompetitive conduct and *de facto* control of HBC, it also alleges that Clear Channel holds an attributable interest in HBC because the HBC Board of Directors retains two members that were originally appointed by Clear Channel. The Commission, in the past, has determined that an investor's relationship to an entity's Board of Directors could result in an attributable level of influence under certain circumstances.[39]

17. In response to this allegation, HBC has provided a declaration from McHenry Tichenor, Jr., stating that the "nonvoting stock which Clear Channel holds in HBC affords Clear Channel no right or ability to vote with respect to who shall serve on HBC's Board of Directors," and that he, not Clear Channel, designated the original members of HBC's Board of Directors, including the two former Clear Channel designees cited in the Amended Complaint. Tichenor further states that he "decided to ask two persons who had served on the board of the pre-merger Heftel entity to serve on the HBC Board after satisfying [himself] as to their qualifications, independence and loyalty to HBC."[40] Tichenor also states that since designation of the original HBC Board of Directors, "each of these five Directors has been re-elected to HBC's Board on six separate occasions, at the annual meetings of HBC stockholders, by the voting stockholders of HBC," and that Clear Channel is not a voting shareholder of HBC.[41]

18. Although the two directors cited by SBS in the Amended Complaint do appear to be former Clear Channel designees to the Heftel Board of Directors, they are neither Clear Channel employees nor executives. Rather, they work for financial institutions that provided banking services for Clear Channel. These directors, moreover, have been elected independently to the HBC board subsequent to their appointment by Clear Channel to the Heftel Board. We find that these directors can reasonably be expected to act independently. NHPI has failed to provide any evidence supporting its allegation that Clear Channel has been able to influence the HBC Board of Directors through these directors. We, therefore, conclude that the presence of two former Clear Channel designees on the HBC board does not justify attribution of Clear Channel's interest. Based on the information before us, we conclude that Clear Channel's current interest in HBC and its proposed interest in Univision are both nonattributable.

(b) De Facto Control

[38] *See Sunburst Media, L.P.*, 17 FCC Rcd 1366, 1368 (2002).

[39] *See, e.g., Telemundo Communications Group, Inc.*, 17 FCC Rcd 6958, 6972 (2002) (NBC's right to nominate members to the Paxson Communication's Corporation Board of Directors; presence of NBC employees on Paxson Board; and conduct of NBC-nominated directors when taken together indicated that NBC's interest should be attributable).

[40] Declaration of McHenry T. Tichenor, Jr. at 1.

[41] *Id.* at 2.

19. In addition to claiming that Clear Channel has an attributable interest in HBC, NHPI argues that Clear Channel exercises *de facto* control over HBC, and that Clear Channel will exercise this level of control over Univision if the merger is approved. NHPI acknowledges that the Commission concluded in *Shareholders of AMFM, Inc.* that Clear Channel's interest in HBC was neither attributable nor rose to the level of *de facto* control.[42] NHPI argues, however, that this holding was implicitly conditioned upon the Commission's finding that Clear Channel did not "possess any participatory rights in HBC or its broadcast holdings."[43] NHPI argues that Clear Channel has "actively participated in the affairs of HBC" and, thus, Clear Channel should be found to have exercised *de facto* control over HBC.[44]

20. We clarify that *Shareholders of AMFM, Inc.* did not *per se* prohibit all forms of informal Clear Channel participation in HBC, regardless of its nature. The Commission's statement was rather an observation that Clear Channel did not possess any "participatory rights" deriving from its status as an investor, other than the right to participate in certain fundamental corporate actions.[45] The statement reflected the Commission's concern that Clear Channel could have excessive influence over the operations of HBC if Clear Channel had "participatory rights" in addition to those governing fundamental corporate actions. NHPI appears to acknowledge that Clear Channel has no veto or voting rights over HBC corporate actions other than those approved in *Shareholders of AMFM, Inc.*, and no evidence has been presented indicating that such additional rights exist. The Commission, of course, considers informal participation even when not taken through a formal investment-based "participatory right," but evaluates such informal participation within the framework of our attribution rules and policies, and our policies and precedent governing determinations of *de facto* control.

21. NHPI argues that new facts have come to light indicating that Clear Channel's informal participation in HBC rises to the level of *de facto* control. The Commission analyzes *de facto* control issues on a case-by-case basis.[46] In determining whether an entity has *de facto* control of an applicant or a licensee,[47] we have traditionally looked beyond legal title and financial interests to determine who controls the basic operating policies of the station.[48] The Commission, in particular, examines the policies governing station programming, personnel, and finances. The Commission has long held that a licensee may delegate day-to-day operations without surrendering *de facto* control, so long as the licensee continues to set the policies governing these areas.[49]

22. In determining whether NHPI's Petition to Deny justifies designating these applications for hearing on the issue of *de facto* control, Section 309(d) of the Communications Act provides for a

[42] *Shareholders of AMFM, Inc.*, 15 FCC Rcd at 16078.

[43] *Id.*

[44] NHPI Petition to Deny at 10.

[45] *See, e.g.*, *Quincy D. Jones*, 11 FCC Rcd 2481, 2487 (1995).

[46] *See Chase Broadcasting, Inc.*, 5 FCC Rcd 1642, 1643 (1990).

[47] Such a finding would result in a violation of Section 310(d) of the Communications Act. 47 U.S.C. § 310(d).

[48] *See WHDH, Inc.*, 17 F.C.C.2d 856, 863 (1969), aff'd sub nom., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

[49] *WGPR, Inc.*, 10 FCC Rcd 8140, 8142 (1995); *Choctaw Broadcasting Corp.*, 12 FCC Rcd 8534, 8539 (1997); *Southwest Texas Broadcasting Council*, 85 F.C.C.2d 713, 715 (1981).

two-step test.[50] First, the petition to deny must set forth "specific allegations of fact sufficient to show that...a grant of the application would be *prima facie* inconsistent with [the public interest]."[51] Second, the Commission will formally designate an application for hearing in accordance with Section 309(e) of the Communications Act when,[52] based upon the totality of the evidence, there is a "substantial and material question of fact" concerning whether grant of the application would serve the public interest.[53]

23. To satisfy the first prong of the test, a petitioning party must set forth allegations, supported by affidavit, that constitute "specific evidentiary facts, not ultimate conclusionary facts or mere general allegations."[54] The Commission determines whether a petitioner has met this threshold inquiry in a manner similar to a trial judge's consideration of a motion for directed verdict: "if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established."[55]

24. If the Commission concludes that a petitioner has satisfied the first prong, it must then proceed to the second phase of the inquiry and determine whether, "on the basis of the application, the pleadings filed or other matters which [the Commission] may officially notice," there is a "substantial and material question of fact."[56] If, based on "the totality of the evidence" presented in the pleadings, the Commission concludes that this question of fact gives rise to sufficient doubt as to whether grant of the application would serve the public interest, the Commission must designate the application for hearing.[57] The Commission is not required to rigidly follow this two-step process, and can focus first on the second step in evaluating a petition to deny.[58]

25. NHPI has failed to raise a substantial and material question of fact regarding Clear Channel's potential *de facto* control over Univision after the merger. As noted above, Clear Channel will have a diluted ownership interest in Univision as a result of this transaction and HBC, as previously constructed, will cease to exist. Not only will Clear Channel have a small 3.66% voting interest in the post-merger Univision, but Univision will continue to have a single-majority shareholder after the transaction. Nothing NHPI has filed would explain how Clear Channel could overcome A. Jerrold Perenchio's *de jure* voting control to exercise *de facto* control. In light of these facts, NHPI's contention

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[50] 47 U.S.C. § 309(d).

[51] Id. § 309(d)(1); *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) (*Gencom*); and *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988) (*Astroline*).

[52] 47 U.S.C. § 309(e).

[53] 47 U.S.C. § 309(d)(2); *Gencom*, 832 F.2d at 181; and *Astroline*, 857 F.2d at 1562.

[54] *United States v. FCC*, 652 F.2d 72, 89 (D.C. Cir. 1980) (*en banc*) (*quoting Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 323-24 (D.C. Cir. 1974)).

[55] *Gencom*, 832 F.2d at 181.

[56] 47 U.S.C. § 309(d)(2); *see also Gencom*, 832 F.2d at 181.

[57] *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998) (*quoting Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985)).

[58] *See Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1409-10 (D.C. Cir.), *cert. denied*, 519 U.S. 823 (1996).

that Clear Channel will control Univision after the merger is speculative at best.[59] We further conclude that, based on our review of the record evidence, NHPI has failed to raise a substantial and material question of fact justifying designation of these applications for hearing on the issue of Clear Channel's alleged current *de facto* control over HBC. Below we discuss the evidence contained in the pleadings.

26. **Amended Complaint.** NHPI has attached to its petition an Amended Complaint filed by SBS in a Federal District Court opposing the merger of Univision and HBC and, in particular, alleging Clear Channel participation in the affairs of HBC. SBS states that Clear Channel and HBC have attempted to depress SBS's stock price; have prevented an initial public offering of SBS stock; have undermined key SBS employment and business relationships; have induced large investors to sell SBS holdings; and have attempted to prevent SBS from acquiring a number of radio stations that could compete with Clear Channel and HBC radio stations.[60] With respect to whether Clear Channel has exercised *de facto* control over HBC, the complaint alleges that Clear Channel personnel met with SBS personnel to discourage SBS's competing offer for HBC. The Amended Complaint also alleges that Clear Channel exercised control over specific HBC decisions not related to the Univision/HBC merger, including decisions to purchase particular stations and decisions over contracts with national advertising representation firms.[61] The U.S. District Court dismissed the lawsuit on January 31, 2003, finding that SBS had failed to demonstrate injury to competition in the relevant market necessary to make out a claim under either Section 1 or 2 of the Sherman Act.[62] The Court further declined to exercise its supplemental jurisdiction over the myriad state law claims raised by SBS.

27. HBC asserts that SBS's allegations involve anticompetitive conduct and that the Commission considers such conduct only when and if there is a final adjudication. HBC argues that the other causes of action, which involve mostly torts or breaches of contract, involve private rights that raise no regulatory concern for the Commission. With respect to the issue of *de facto* control, HBC maintains that the Complaint contains unsupported allegations insufficient to support a petition to deny. According to HBC, most of the allegations are based on events that occurred prior to Commission approval of the Heftel-Tichenor merger that resulted in the formation of HBC.

28. The Commission considers the effect a merger will have on competition in its public interest analysis, but does not generally consider the kind of specific acts of anticompetitive conduct alleged in the Amended Complaint, especially those involving causes of action under state law, unless and until there is a final adjudication.[63] NHPI, in any case, has provided only very limited, indirect

[59] *See, e.g., Univision Holdings, Inc.*, 7 FCC Rcd at 6675. ("[P]etitioners are essentially asserting that in the future the Buyer will be operated in a manner inconsistent with our requirements or with the representations made by the Buyer in the applications and in affidavits. In the absence of properly supported specific allegations of fact to support a contrary conclusion, we do not assume that an applicant will not faithfully carry out its representations or that [an applicant] will be operated in a manner that differs from the [transaction] under question.").

[60] SBS in its *ex parte* presentations and associated attachments also alleges anticompetitive conduct on the part of Clear Channel. SBS has filed the Amended Complaint as part of its *ex parte* presentation.

[61] SBS also raises these allegations in its September 30, 2002, presentation to Commission staff.

[62] *Spanish Broadcasting System v. Clear Channel Communications, Inc., Order Granting Defendant's Motion to Dismiss,* Case No. 02-21755 (rel. Jan. 31, 2003); Sherman Act, 15 U.S.C. §§ 1 and 2.

[63] *Policy Regarding Character Qualifications in Broadcast Licensing (Character Policy),* 102 F.C.C.2d 1179, 1205 (1985).

evidence which it claims supports the allegations raised by the Amended Complaint, and the court dismissed it. Under these circumstances, we conclude that further consideration of the anticompetitive conduct alleged in the Amended Complaint is not warranted.

29. NHPI also fails to support the allegations of Clear Channel *de facto* control over HBC with record evidence, affidavit or sworn testimony. The allegations, therefore, fail to meet the pleading requirements of Section 309(d)(1) of the Communications Act.[64] Much of the Amended Complaint contains conclusory statements regarding the market power of Clear Channel and its effect on HBC, and several of the specific allegations relate to events occurring prior to the merger of Heftel and Tichenor. Clear Channel legitimately exercised voting control over Heftel prior to the merger with Tichenor, but deliberately divested itself of this interest. As discussed above, the Commission approved the Clear Channel/HBC relationship in *Shareholders of AMFM, Inc.* The record evidence indicates that Clear Channel's role in the negotiations leading up to the Univision/HBC merger appears to be consistent with the nonvoting shareholder rights the Commission approved. For example, SBS, as part of its *ex parte* presentation, submitted an April 18, 2002 letter from L. Lowry Mays, Chairman and Chief Executive Officer of Clear Channel, to Raul Alarcon, Chairman and Chief Executive of SBS, acknowledging receipt of SBS's proposal to acquire HBC. In the letter, Mays states that he was certain the HBC board "will seriously consider the proposal,' but that "Clear Channel is a passive investor and can have no voice in [approving the proposal] unless and until it is brought to a vote."[65] We conclude that absent credible substantiating evidence the Amended Complaint does not establish a *prima facie* case or raise a substantial and material question of fact regarding Clear Channel's alleged *de facto* control over HBC.

30. **Annual Employment Reports.** In support of its claim of *de facto* control, NHPI maintains that Clear Channel personnel work, or have worked, at HBC stations. NHPI has attached, as exhibits to the Petition to Deny, 12 FCC Form 395B Annual Employment Reports (collectively referred to as "EEO Reports") filed on or about November 15, 2000, pursuant to the then-existing rules implementing the Commission's broadcast equal employment opportunity program.[66] NHPI's allegation that Clear Channel personnel work, or have worked, at HBC stations is based on inferences drawn from the information contained in those reports.[67]

31. An FCC Form 395B Annual Employment Report was typically filed on behalf of an "employment unit" - a group of commonly owned stations located within a specific geographic area that shared at least one employee. The licensee filing the report could have been the entity owning any one of the stations in the employment unit. The Annual Employment Report was intended to elicit consolidated employment figures for all full and part-time employees working in an employment unit. Section I of the report asked for the legal name of the filing licensee, while Section IIB requested that the filing licensee

[64] 47 U.S.C. § 309(d)(1).

[65] We conclude that a 600-page filing submitted jointly by SBS and NHPI on April 7, 2003, approximately 7 months after the pleading cycled closed in this case, is untimely and will be dismissed. We have, moreover, reviewed the filing and conclude that it does not alter any of the conclusions reached in this decision.

[66] *See Suspension of the Broadcast and Cable Equal Employment Outreach Program Requirements*, 16 FCC Rcd 2872 (2001) (suspending portions of the broadcast and MVPD EEO rules governing EEO outreach program and reporting requirements).

[67] Clear Channel completed its purchase of approximately 400 stations owned by AMFM, Inc. approximately 2 ½ months before the EEO Reports were filed.

"[l]ist call sign and location of all stations whose employees are on this report," including "commonly owned stations [within a specified geographic area] which share one or more employees."[68] Section V of the report requested data on full and part-time employees working at an employment unit, categorized on the basis of sex and race.

32. The first four attached EEO Reports list HBC or its subsidiaries as the signatory licensee, but list stations owned by Clear Channel subsidiaries in Section IIB as belonging to a common employment unit. NHPI argues, therefore, that Clear Channel must have its employees at HBC stations. The remaining 8 attached EEO Reports list Clear Channel subsidiaries as signatory licensees, but also list stations owned by HBC subsidiaries in Section IIB as belonging to a common employment unit. In addition to commingling Clear Channel and HBC stations in Section IIB, NHPI points out that Clear Channel's corporate headquarters is listed on Section I of the attached EEO Reports under the name of the signatory licensee. Though none of the attached EEO Reports are signed, NHPI states that Rick Wolf's name, acting as Vice-President and Corporate Counsel of Clear Channel, is typed below the certification contained in Section IV of the 12 reports.

33. Clear Channel and HBC maintain that all 12 attached EEO Reports contain mistaken information. With respect to the 8 reports signed by Clear Channel or one of its subsidiaries, HBC maintains that its stations were listed by mistake. HBC provides a declaration from Neal A. Murphy, Corporate Counsel for Clear Channel, who states that, in preparing Clear Channel's EEO Reports, Clear Channel personnel used an internal electronic database listing all stations in which it had an interest by geographic market. Murphy states that the electronic database listed stations in which Clear Channel had any interest, regardless of whether that interest was attributable under Commission rules, primarily "for the purpose of disclosure in Clear Channel's FCC filings."[69] Murphy, however, affirmatively certifies that the employee numbers contained in the attached EEO Reports were derived from a separate payroll database that listed only Clear Channel employees.[70] HBC further certifies that the EEO Reports "reflected only the [Clear Channel] employees who work for Clear Channel's stations," and "did not include any employees who work for HBC's stations."[71] Clear Channel personnel, according to Murphy, compiled the individual reports by lifting one of the entities listed in the electronic database from the relevant geographic market and transposing it onto Section 1 of the EEO Report.[72] The other stations listed in Section IIB of the report were likewise transposed from Clear Channel's internal electronic database.

34. With respect to the 4 EEO Reports where HBC was the signatory licensee, HBC and Murphy certify that the same process was followed, and that the employees listed in these reports were also Clear Channel employees working at Clear Channel stations. Neil Murphy further states that the forms attached to the petition were filed electronically, and that HBC itself filed paper reports that reflected its employees. As support for this assertion, HBC has attached its own Annual Employment Reports for the same 12 markets. All of the reports are signed by McHenry Tichenor, Jr., a principal of

[68] FCC Form 395B Broadcast Station Annual Employment Report, IIB.

[69] Declaration of Neil A. Murphy at 1.

[70] *Id.*

[71] Opposition of HBC at 7.

[72] Declaration of Neil Murphy at 2.

HBC, on or about September 28, 2000. The employment data contained in the HBC reports differs from the data contained in those Clear Channel reports naming HBC subsidiaries as the reporting licensee.

35. NHPI argues in its Reply that the EEO Reports conclusively demonstrate that Clear Channel did have employees at HBC stations. NHPI asserts, moreover, that HBC has failed to explain why Clear Channel was filling out reports for stations it did not own.[73]

36. We conclude that the EEO Reports do not raise a substantial and material question of fact on the issue of Clear Channel's alleged *de facto* control over HBC. The fact that HBC filed its own EEO Reports suggests that Clear Channel mistakenly included HBC licensees in its reports. The discrepancy, however, between the figures contained in the reports filed by HBC and Clear Channel, respectively, appears to lend support to Clear Channel's argument that the mistaken reports included only Clear Channel employees working at Clear Channel stations. Based on our review of the record, it appears that all of the Clear Channel reports, including those filed for HBC licensees, were completed using employment figures for Clear Channel stations only. Besides the fact that Clear Channel filed mistaken EEO Reports, NHPI has failed to provide any specific evidence that Clear Channel employees work or have worked at HBC stations.[74]

2 Entravision

37. Univision currently holds an attributable interest in Entravision through ownership of

[73] NHPI also argues that a declaration by Neil Murphy in a previous case made no mention of Clear Channel having filed FCC Form 395B Annual Employment Reports listing stations owned by HBC or listing stations in which Clear Channel had no employees. The facts at issue in the previous case cited by NHPI are different than those presented here. We do not believe, therefore, that this previous declaration is inconsistent with the one filed in this case.

[74] NHPI argues that "Clear Channel's active participation in the affairs of HBC demonstrates a pattern of conduct in which Clear Channel conceals, through numerous material misrepresentations to the FCC, the actual ownership and control of established radio station groups, including HBC." NHPI Petition to Deny at 15. NHPI cites as evidence a petition to deny filed on November 8, 2001, by David Ringer against the license assignment of WFCB(FM), Chillicothe, Ohio from Secret Communications II, Inc. to Clear Channel. See File No. BALH-20010918AAP. Ringer alleged that Clear Channel used front companies to control stations it could not otherwise own under the multiple ownership rules, providing EEO Reports as support for this contention. The Commission has determined that the facts alleged in the Ringer petition do not raise a substantial and material question of fact that Clear Channel engaged in an unauthorized transfer of control of WFCB(FM). *See Secret Communications II, LLC*, 18 FCC Rcd 9139, 9147 (2003). Our decision here is consistent with that determination. We further find that the EEO Reports cited in the Chilicothe case are not directly relevant here because Clear Channel had a Local Marketing Agreement (LMA) with the licensee of WFCB(FM). The Commission has long permitted brokers to place employees at brokered stations, as long as the licensee complies with its obligation to retain ultimate control of station operations and maintains the minimum staffing requirements set forth in the Main Studio Rule. *Shareholders of the Ackerley Group, Inc.*, 17 FCC Rcd 10828, 10842 (2002); *WGPR, Inc.*, 10 FCC Rcd at 8143; *Main Studio and Program Origination Rules (Clarification)*, 3 FCC Rcd 5024 (1998), *recon. denied in part and granted in part*, 7 FCC Rcd 6800 (1992). The Ringer petition, therefore, does not support the "pattern of conduct" alleged by NHPI. NHPI further states that websites registered to Clear Channel are operated by stations in which Clear Channel ostensibly has a nonattributable interest, and that this demonstrates that the companies owning these stations are "fronts." Domain registration is not necessarily probative of ultimate control over programming, personnel and finances, and such an alleged connection in this case is speculative and unsupported. *See Secret Communications II, LLC*, 18 FCC Rcd at 9148.

9.86% of Entravision's voting stock,[75] as well as through its right to designate two members to the Entravision Board of Directors. As noted above, Univision states in the instant transfer of control application that it intends to convert its current interest into "a non-voting, non-attributable stock interest."[76] Following an informal staff request, Univision amended its showing to state that "[d]irectors previously elected to the Entravision Board by Univision have resigned."[77]

38. NHPI, in its Reply to the Univision's Opposition, argues that Univision fails to state whether it will modify the rights of its Class C shares so as not to be able to designate members to, or otherwise influence, the Entravision board in the future. NHPI also questions whether Univision's post-merger interest in Entravision would comply with the Commission's EDP attribution standard. NHPI, in particular, contends that any EDP analysis should include accounts payable owed to Univision from Entravision.

39. On November 29, 2002, the staff released a letter ("Letter of Inquiry") requesting information to assist in determining whether the proposed future interest in Entravision would be nonattributable. The Letter of Inquiry requested information regarding the "class or classes of Entravision shares Univision will hold after consummation (including those shares that are not currently voting) and their rights with respect to the Entravision Board of Directors."[78] The Letter of Inquiry requested information regarding any accounts payable owed to Univision from Entravision, and a showing demonstrating compliance with the EDP standard.

40. In response, Univision further amended its showing to state that "Univision currently has no representation on Entravision's board of directors, and, prior to consummation of the HBC merger, all of Univision's stock holdings in Entravision will be converted into a new preferred, nonvoting stock that has no right of board representation or other board rights."[79] Univision, however, represented that the new class of stock will have approval rights over certain corporate actions consistent with those previously approved by the Commission. As mentioned above, the DOJ entered into a Consent Decree with Univision on March 25, 2003, requiring Univision to remove and/or modify certain of these rights.[80] As approved by the DOJ, Univision has proposed to hold approval rights only over (1) merger, sale, liquidation, and dissolution of Entravision; (2) amendment, alteration or repeal of the Certificate of Incorporation so as to adversely affect the rights of Univision's stock; (3) issuance or sale of the proposed class of stock; and (4) any sale of a station affiliated with a Univision-owned network.

41. NHPI challenges several of the originally proposed approval rights, arguing that they "far exceed the level of influence required for the Commission to find that Univision's interest in Entravision is attributable," and that "the Commission could find that Univision's proposed rights will give it *de facto* control over Entravision's operating policies."[81] Univision has, however, with the

[75] 47 C.F.R. § 73.3555, Note 2(a).

[76] Applications for Transfer of Control, Exhibit 16, n.1.

[77] August 29, 2002 Amendment at n.1.

[78] November 29, 2002 Letter of Inquiry.

[79] December 9, 2002, Response to Letter of Inquiry at 1.

[80] *Infra* ¶ 6.

[81] December 16, 2002, Reply of NHPI at 3.

exception of the proposed rights retained following discussions with the DOJ, removed any proposed approval rights over corporate actions from the new class of nonvoting stock to be created following the merger. NHPI's argument, therefore, that the constellation of originally proposed approval rights would result in attributable influence on the part of Univision is moot.

42. With respect to the approval rights that remain, the Commission has consistently held that a nonvoting shareholder's approval rights over fundamental corporate matters are "permissible investor protections that neither restrict a corporation's discretion or rise to the level of attributable influence."[82] Such "fundamental" or "extraordinary" corporate actions are, as the terms imply, those that fundamentally alter the character of the nonvoting shareholder's investment. Determining what rights involve fundamental corporate matters in any particular case is fact-based. In the past, however, the Commission has allowed nonvoting shareholders to hold several different protection rights without forfeiting their nonattributable status due to the Commission's desire not to disrupt the flow of capital to station owners, and its determination that such rights protect the investor as opposed to provide an opportunity for the investor to influence the overarching policymaking activities, programming decisions or day-to-day operations of a station.[83] Specifically, the Commission has permitted approval rights regarding the merger, sale, liquidation or winding up of an entity; the sale of all or substantially all of the entity's assets; the amendment of the Certificate of Incorporation; and the issuance or sale of stock.[84] These decisions are implicitly premised on the fact that such changes by necessity alter the fundamental character of the nonvoting shareholder's investment, and that some provisions to protect nonvoting shareholders against such changes are reasonably necessary to promote investment. We therefore conclude here that Univision's similar proposed rights in Entravision do not undermine the nonattributable nature of Univision's relationship with Entravision.

43. On March 10, 2003, the staff released a letter requesting further information regarding the proposed approval right over the sale of any Entravision station affiliated with a Univision-owned network. In response, Univision argues that this proposed approval right is also consistent with protections the Commission has previously permitted. Univision cites, in particular, the nonvoting shareholder rights and other interests NBC currently holds in Paxson Communications Corporation, which the Commission approved in *Telemundo Communications, Inc.*[85] Univision states that, among several other rights set forth in a 1999 Investment Agreement, NBC has the right to approve the sale of any Paxson station in a top-20 TV market, and a right of first refusal regarding the sale of any Paxson station. According to Univision, these nonvoting shareholder rights are coupled with (1) a 32% nonvoting equity interest in Paxson convertible to a voting interest upon prior Commission consent; (2) a warrant and call option for ten years permitting NBC to acquire a "super-majority" voting bloc; (3) Joint Sales Agreements and Time Brokerage Agreements involving individual stations, and a National Sales Agreement for all Paxson stations; and (4) the right to nominate 3 members to the Paxson Board of Directors who are not NBC employees. Univision argues that the rights proposed here are more limited than those the Commission permitted NBC to hold, especially in light of the fact that the proposed

[82] *Shareholders of AMFM, Inc.*, 15 FCC Rcd at 16078; *see also BBC License Subsidiary L.P.*, 10 FCC Rcd 7926, 7933 (1995); *Quincy D. Jones*, 11 FCC Rcd at 2487; *Roy M. Speer*, 11 FCC Rcd 14147, 14155-58 (1996).

[83] *See Roy M. Speer*, 11 FCC Rcd at 14157-58.

[84] *See Shareholders of AMFM, Inc.*, 15 FCC Rcd at 16078.

[85] *Telemundo Communications, Inc.*, 17 FCC Rcd at 6971.

nonvoting stock will have no board representation rights. Univision further argues that, "in *National Broadcasting Company, Inc.*, the Commission held that a network's combination of a 49% equity interest along with its provision of programming did not create an attributable interest in the licensee of an affiliated station, even where the network also retained a veto power over various business transactions, including the sale of the station or dissolution of the licensee."[86]

44. Because Entravision owns 18 full-service television stations, almost all of which are affiliated with a Univision-owned network, Univision's approval right restricts the sale of almost every Entravision television station. The sale of any single one of these television stations cannot be considered a "fundamental" or "extraordinary" corporate action. By contrast, in *National Broadcasting Co.*, the licensee owned only one television station and thus a sale of that one station was, indeed, a "fundamental" corporate matter, analogous to a sale of all or substantially all of the licensee's assets. Similarly, in *Quincy D. Jones*, the Commission's finding that a nonvoting interest in the licensee was nonattributable was explicitly based upon its interpretation of an approval right nominally over the sale or other disposition of any material portion of the licensee's assets "other than in the ordinary course of business," as meaning only the right to approve where all or substantially all of the licensee's assets were to be sold.[87] Moreover, even in permitting nonattributable shareholders the right to participate in extraordinary corporate actions, the Commission has stated that those rights must be "narrowly circumscribed" for the interest to remain nonattributable.[88] Here, permitting the proposed veto right would enable Univision not only to be an exclusive network program supplier to virtually all Entravision television stations, but to control the sale of virtually any Entravision television station as well. Contrary to Univision's argument, the level of influence over the core operations of Entravision's television stations that would result would exceed that permitted in *Telemundo Communications, Inc.*, where NBC's approval right over station sales was limited to the top-20 TV markets.[89] In any event, insofar as the Commission's order in *Telemundo Communications, Inc.*, can be construed to be inconsistent with this or prior opinions, we decline to follow it. Accordingly, we conclude that Univision's proposed right to veto the sale of any Entravision television station affiliated with a Univision network would render its interest in Entravision's television stations attributable.

45. In a June 25, 2003, filing, Univision argues that, even should we attribute Univision's interest in Entravision's television stations, the approval right over affiliate sales does not extend to Entravision's radio stations and that, therefore, its interest in Entravision's radio stations should not be attributable. Univision also argues that the Department of Justice's Consent Decree prevents it from exercising any influence over Entravision's radio business.[90] In the circumstances present here, we agree that attribution of Univision's interest in Entravision's television stations does not extend to Entravision's radio stations. As Univision notes, its sale approval right does not extend to Entravision's radio stations. Moreover, the Consent Decree prohibits Univision from "using or attempting to use any rights or duties

[86] March 12, 2003, Response to Letter of Inquiry at 2. *See, also, National Broadcasting Company, Inc.*, 6 FCC Rcd 4882 (1991).

[87] *Quincy D. Jones*, 11 FCC Rcd at 2847 n.15.

[88] *Id.* at 2847.

[89] We note that in *Telemundo Communications, Inc.*, no party specifically challenged the veto right over the sale of a top-20 station, and that right was not even mentioned in the Commission's decision, much less discussed.

[90] June 25, 2003, Letter of Univision Communications, Inc., at 11-12.

under any television affiliation agreement or relationship between Univision and Entravision (including any duties Univision may have as a national sales representative for Entravision), to influence Entravision in the conduct of Entravision's radio business," as well as prohibits Univision, subject to certain exceptions, from "communicating to or receiving from any officer, director, manager, employee or agent of Entravision any nonpublic information regarding any aspect of [Univision's] or Entravision's radio business, including any plans or proposals with respect thereto."[91] The Consent Decree also contemplates an antitrust compliance program, along with designation of an Antitrust Compliance Officer, whose responsibility will be to, "on a continuing basis, supervise the review of current and proposed activities to ensure compliance with the [Consent Decree]."[92] We conclude that the absence of the contractual approval right over the sale of Entravision's radio stations and the Consent Decree's provisions reasonably prevent Univision from exercising a cognizable level of influence over the core operating functions of Entravision's radio stations while those provisions remain in effect. We conclude, moreover, that attribution of Univision's interest in Entravision's television stations alone will not result in violation of the Commission's radio/television cross-ownership rule.[93]

46. We recognize that the Consent Decree, according to its terms, expires within 10 years after entry of the proposed Final Judgment by the Court. Because we rely on the insulation effects of the Consent Decree in reaching our attribution determination in this case, we will require Univision to notify the Commission if the Consent Decree expires, terminates, or the relevant provisions change. Upon such notification, we will reevaluate whether, and to what extent, Entravision should be attributed to Univision and what further requirements, if any, we should impose as a result of that reevaluation.

47. With respect to whether the proposed future interest in Entravision would comply with the EDP Rule, the other issue raised in the November 29, 2002, Letter of Inquiry, the Commission, in the *Attribution Reconsideration*, stated that an applicant may determine its total assets by using the station's "book value as defined under standard financial accounting practices, or some other value, including the fair market value, provided the valuation is reasonable."[94] In response to the November 29, 2002, Letter of Inquiry, Univision provided an audited financial statement for the year ending on December 31, 2001, as well as unaudited financial statements for the period covering January 1, 2002, to October 31, 2002. These cover roughly the same period as the balance sheets provided to the SEC as part of its Form 10-Q filing for the quarterly period ending September 30, 2002. The balance sheet provided to the SEC in the Form 10-Q filing was unaudited. According to the calculation provided, which includes accounts payable owed to Unvision from Entravision, Univision's post-merger interest in Entravision would fall below the 33% threshold of total assets set forth in the EDP attribution standard. Having reviewed the showing, we conclude that Univision's proposed interest in Entravision would comply with the EDP standard.

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[91] Consent Decree, at 7.

[92] Id. at 11-12.

[93] Even though the effective date of the new rules has been stayed, we note, as an aside, that attribution of Univision's interest in Entravision's television stations alone will not implicate the Cross-Media Limits set forth in the *2002 Biennial Review Order*.

[94] *Attribution Reconsideration*, 16 FCC Rcd at 1110. "[I]f the issue arises in connection with a transfer or assignment application or an ownership report filed after consummation of an assignment or transfer, the applicant must use the sales price of the transfer or assignment as the total asset value." *Id.* No Entravision station is being transferred as a result of this merger and, therefore, Univision may use any reasonable valuation method.

48. We conclude that, based on the representations contained in the responses to the Letters of Inquiry and related record evidence, Univision has adequately demonstrated that its interest in Entravision's radio stations following consummation will not be attributable under our attribution criteria. Our conclusion rests upon Univision's representation that its voting stock interest in Entravision following consummation will be less than 5%, which includes stock held by officers and directors of Univision; that the total debt and equity held by Univision following consummation will not exceed 33% of the total asset value of Entravision, which includes debt and equity held by officers and directors of Unvision; and that Univision, prior to consummation, will divest itself of any class of stock permitting it to designate members to, or otherwise influence the Entravision Board of Directors. Though we find that Univision's right to approve any sale of any Entravision television station affiliated with a Univision-owned network will render Univision's interest in Entravision's television stations attributable, we do not extend this finding of attribution to Entravision's radio stations.

49. NHPI nevertheless argues that, despite the pledges made in the application, amendments and in responses to the Letters of Inquiry, Univision will continue to have significant influence over the business of Entravision such that its interest should be attributable. NHPI cites as support a network affiliation agreement between Univision and Entravision that gives Entravision stations the exclusive right to broadcast Univision programming 24 hours a day. NHPI also states that Univision acts as Entravision's exclusive national advertising representative firm. NHPI contends that Entravision has acknowledged the importance of its relationship with Univision in various SEC filings and further questions whether Univision can reasonably be expected to alter this relationship after the merger. Univision argues that its status as a program supplier to Entravision does not, in itself, warrant attribution. Univision states that, instead, the Commission applies the EDP standard to such relationships in order to determine attribution.[95]

50. In the *Attribution Order*, the Commission specifically declined to treat program supply relationships, such as network affiliation agreements, as *per se* attributable, rather subjecting such relationships to the EDP standard.[96] To the extent it may be appropriate to address concerns regarding a particular affiliation agreement, the Commission does so within the context of the EDP analysis,[97] or our policies and precedent involving attribution of specific interests. The Commission has also consistently held that advertising representation does not constitute an attributable interest, having removed such interests from consideration under the former cross-interest policy before the Commission released the *Attribution Order*.[98]

[95] 47 C.F.R. § 73.3555, Note 2(i).

[96] *Attribution Order*, 14 FCC Rcd at 12599-600.

[97] *Id.* at 12579. *See also Sunburst Media, L.P.*, 17 FCC Rcd at 1368.

[98] *See Shareholders of AMFM, Inc.*, 15 FCC Rcd at 16076. Under the *Golden West* policy, the Commission held that representation of a station by a sales representative owned wholly or partially by the licensee of a competing station in the same community or service area would result in attribution. *See Golden West Broadcasters*, 16 FCC 2d 918 (1969). However, the Commmission abolished this policy with respect to attribution, holding that market forces and the remedies available under antitrust statutes were sufficient to deter the anti-competitive practices the policy was meant to address. *See Representation of Stations by Representatives Owned by Competing Stations in the Same Area*, 87 F.C.C.2d 668 (1981). The Commission has also granted Univision a permanent waiver of the Network Representation Rule, which prohibits stations, other than those owned and operated by their network, from

(continued....)

51. A "major program supplier," as that term is defined by the *Attribution Order*, will have an attributable interest if its combined debt and equity exceeds 33% of the total asset value of the licensee. As noted above, based on the record evidence, including the responses to the Letters of Inquiry, Univision will not hold more than 33% of the total asset value of Entravision.[99] As we stated before, any challenge to the adequacy of the EDP standard is more appropriately raised within the context of a rulemaking proceeding.

D Elgin Informal Objection

52. Elgin FM Limited Partnership owns three FM broadcast radio stations in Texas and competes against stations owned by HBC. Elgin argues that the combination of Univision and HBC will essentially create a Spanish language media monopoly and will therefore be anticompetitive, negatively affecting existing and future Spanish language media operators.[100] Elgin also argues that Univision's relationship with other companies in the Spanish language music entertainment industry means that Univision will be able to control all aspects of Spanish language entertainment.[101] Elgin further states that because Clear Channel (which will own a small percentage of Univision stock if the transaction is approved) controls many large entertainment venues, it is questionable whether broadcasters unaffiliated with either Univision, Entravision, or Clear Channel will have a reasonable opportunity to be involved with one of those venues if the transaction is approved.[102] Finally, Elgin states that it will be difficult for independent Spanish language media operators to generate the synergies necessary to compete with "media giants" Univision and Clear Channel.[103]

53. With respect to the claim that the transaction is contrary to the public interest because it is anticompetitive, parties who file petitions to deny an application have the burden of pleading sufficient facts to establish a *prima facie* case that grant of the application is contrary to the public interest.[104] General or conclusory allegations or those based simply on belief are not sufficient to pass this test.[105] Elgin provides no support for its implicit yet essential contention that HBC's radio stations and Univision's television stations compete in the same product market. We have generally assumed, in our competition analyses of radio transactions, that radio and television stations do not compete in the same

(...continued from previous page)
being represented by their network in the non-network (spot) advertising sales market. *Amendment of § 73.658(i) of the Commission's Rules*, 5 FCC Rcd 7280, 7282 (1990).

[99] To the extent NHPI is alleging that Univision has *de facto* control over Entravision, we conclude that NHPI has failed to raise a substantial and material question of fact that Univision controls Entravision's programming, personnel or finances.

[100] Elgin Petition at 1-2.

[101] *Id.* at 2.

[102] *Id.*

[103] *Id.*

[104] *See* 47 U.S.C. § 309(d)(2); *Gencom v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987).

[105] *See Telemundo Communications Group, Inc.*, 17 FCC Rcd at 6962; *United States v. FCC*, 652 F.2d 72, 89 (D.C. Cir. 1980) (*en banc*).

product market, and the Department of Justice has followed a similar assumption.[106] Elgin has provided no basis to rebut that assumption in this case. Indeed, Elgin has failed to show that Univision and HBC compete against each other to any extent for listeners or advertisers. Moreover, Elgin has not shown that there are not other competitors that would compete against Univision/HBC in this alleged market, or what Univision/HBC's share of this market would be. In short, Elgin has not shown how this merger potentially would cause anticompetitive harms.

54. With regard to Elgin's claims that Univision will be able to control Spanish language entertainment as a whole, Elgin has not stated how in particular it will be harmed.[107] For example, while it notes that Univision owns record companies, it has not stated that it will no longer be able to play recordings from those companies. While Elgin also argues that Clear Channel controls many entertainment venues, that control exists today. If anything, the transaction – which will result in Clear Channel having a lower percentage of ownership in the HBC radio stations than it has today – makes it less likely that Clear Channel would improperly favor HBC stations over those owned by Elgin and other HBC competitors. The same is true with regard to Elgin's comments about the Katz Media Group, an advertising marketing representative owned by Clear Channel. The transaction would appear to ameliorate, not exacerbate, any competition concerns that arise from the relationship.

55. Finally, Elgin complains that it will be difficult for independent operators, such as itself, to generate the synergies necessary to compete with Univision. In general, though, the increased competitive effectiveness that may result from a transaction is not a reason to disapprove it.[108] Elgin has not explained or provided evidence as to why such increased effectiveness would be anticompetitive.

[106] *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Notice of Proposed Rulemaking*, 16 FCC Rcd 19861, 19895 (2001). See *Infra* ¶ 59.

[107] Media Access Project (MAP) alleges that Univision makes it "very difficult for competitors to hire Univision's TV personalities or 'obtain marquee programming." July 25, 2003, Letter of Media Access Project. On August 21, 2003, Telemundo Communications Group, Inc., filed an *ex parte* letter making similar allegations, as well as alleging that Univision has precluded it from promoting its programming on Entravision's radio stations. August 21, 2003, Letter from Telemundo Communications Group, Inc. Telemundo has suggested a series of conditions which it claims will ensure that Univision will not engage in further alleged anticompetitive practices. We are not convinced that the practices alleged by Telemundo and MAP, even if true, will translate into competitive harms in this case, since Spanish-language programming sources are abundant and growing. Telemundo, for instance, has recently announced that it has gone from acquiring all of its content from outside sources to producing 70% of its own programming. July 28, 2003, Communications Daily, at 11. According to CEO James McNamara, Telemundo's relationship with NBC has "transformed Telemundo from an acquirer of programming to a producer of content" that is specifically geared to U.S. Hispanics. Id. With respect to promotion of its programming, Univision intends to divest a significant portion of its interest in Entravision as a result of the Consent Decree with the DOJ, and Univision will further be prohibited from influencing Entravision's radio business. *Infra* at ¶ 45. Entravision has approximately 52 full-service radio stations on which Telemundo can promote its programming in the future. Any argument that Univision would use its relationship with its HBC radio stations to prevent Telemundo from promoting its programming is speculative and ultimately irrelevant, especially since we find below that there exists no separate Spanish-language media competition or diversity market. Consequently, we do not believe Telemundo's proposed conditions are necessary to protect the public interest.

[108] *See MCI Telecommunciations Corp. and EchoStar 110 Corp., Order and Authorization*, 16 FCC Rcd. 21608, 21625 (1999) ("The public interest, however, is in ensuring robust competition and not in protecting the financial interest of particular firms.").

E Ex Parte Submissions of SBS

56. We have received several filings from SBS relating to the effects of the merger on Spanish-language programming and, in particular, arguing that the merger, if approved, would diminish the diversity of sources available to Spanish-language speakers.[109] Citing a Pew/Kaiser Survey, SBS states that 11% of Hispanics speak no English and 29% speak English "just a little." SBS contends that, "for approximately 40% of Hispanics, English-language broadcast media are of little or no relevance."[110] SBS also has provided a number of declarations from advertisers and marketing firms, which it claims support the conclusion that the advertising industry views the Spanish-language market as separate. Although the arguments are not framed precisely, it appears that SBS is alleging potential harms from the proposed transaction both to competition and diversity within a putative "Spanish-language submarket."

57. We are not convinced. SBS has not established that there is, for competition analysis, an identifiable Spanish-language media market that would be adversely affected by the proposed transaction. In fact, SBS apparently made the opposite point in its March 31, 2003, SEC Form 10-K when it stated that "[e]ach of [its] radio stations compete with both Spanish-language and English-language radio stations in the market...."[111] Further, with respect to the diversity of viewpoints available to viewers and listeners who speak primarily or only Spanish, we find no lack of available alternatives. Indeed, Spanish speakers likely have more media options available to them today than ever in this country's history. We therefore decline to limit or condition our approval of this transaction on the basis of its purported impact on Spanish-speaking audiences.

58. First, with respect to alleged competitive harms, SBS has failed to demonstrate that we should abandon our longstanding reluctance to define product markets based on programming format or language.[112] In particular, for purposes of applying the broadcast multiple ownership rules, the Commission previously has held that Spanish-language programming does not constitute a separate market,[113] and that format choice should not be dictated by government regulation but left to market forces.[114] The record in this proceeding offers no basis to disturb those conclusions.

59. As stated above, we have generally assumed, in our competition analyses of radio transactions, that radio and television stations do not compete in the same product market, an approach

[109] The Commission received *ex parte* filings from SBS on June 11, 16, 20, 23, and 26, 2003; July 3, 14, 16, 21, and 30, 2003; and August 5 and 6, 2003. The Commission has also received numerous *pro se* comments from public interest organizations and individuals.

[110] June 20, 2003, Letter from SBS, at 2.

[111] July 23, 2003 Letter from Univision, at 4.

[112] *See, e.g., Entertainment Formats*, 60 F.C.C.2d 858 (1969), recon. denied, 66 F.C.C.2d 78 (1977); *FCC v. WNCN Listeners Guild*, 540 U.S. 582 (1981) (upholding Commission policy that the public interest is best served by promoting program diversity through market forces, and not by considering station formats in ruling on applications for license renewal or transfer).

[113] *Spanish Radio Network*, 10 FCC Rcd 9954, 9956 (1995).

[114] *Entertainment Formats*, 60 FCC Rcd at 860-861.

the DOJ has generally followed.[115] The record in this proceeding offers no basis to disturb this conclusion. We also note that our conclusions are consistent with the actions of the Department of Justice, Antitrust Division in this case, which, after performing its own investigation, did not pursue possible market power allegations with regard to a purported Spanish-language television-radio market.[116] In response to our longstanding precedent and the actions of the DOJ, SBS has provided only anecdotal evidence that Spanish-language radio and television should be regarded as part of the same product market for competition purposes. The declarations of advertisers and marketing agencies are similarly unconvincing. Demographic statistics raised in sales presentations do not demonstrate the existence of a common Spanish-language radio and television product market for purposes of competition analysis, as illustrated by the fact that Univision has also submitted marketing materials comparing its ratings in local markets to English-formatted competitors.[117] Given the DOJ's decision, we see no reason, within the context of this case, to question our general presumption that television and radio stations compete in separate product markets. To the extent SBS is suggesting that separate Spanish-language radio market exists that would be harmed by the proposed merger, we are unpersuaded. This transaction will have no effect on radio concentration because Univision owns no radio stations.[118]

60. In any event, even if we were to conclude that Spanish-language programming could be regarded as a separate product market, competitive analysis considers current market participants as well as ease of entry into the relevant market. With respect to existing market participants, we note that Telemundo is a direct and substantial competitor to Univision. And, while Telemundo has sought to impose conditions on the current merger based on asserted competitive concerns, we do not believe there is any real risk that Telemundo will be unable to effectively compete even without those conditions.[119] Telemundo is a subsidiary of GE/NBC, an organization with access to broad financial resources and nearly unequaled access to the talent and program production expertise necessary to a successful network. Moreover, the number of programming services targeting the Spanish speaking population of the United States is substantial and growing. The Hispanic audience, even those who are "Spanish-dominant," are not limited to broadcast radio and television programming, but may also access Spanish-language programming via satellite and cable. The May 2003 "Rivera Study," cited by SBS in its June 20, 2003, filing notes that new technologies "offer access to Spanish-language programs that were simply unavailable until the recent past."[120] Univision, in a May 14, 2003, filing, also points out that Hispanics have multiple Spanish-language options available, including at least 26 Spanish-language networks

[115] *Infra* ¶ 53.

[116] *See United States of America v. Univision Communications, Inc. and Hispanic Broadcasting Corporation*, Competitive Impact Statement, Civil Action No. 1:03CV00758, at 5.

[117] See July 23, 2003, Letter from Univision, Exhibit 1. We are, for similar reasons, unmoved by the opinions contained in the Lehman Brothers Report submitted by SBS on June 23, 2003. Marketing and/or investment materials may include terms of art, e.g., "market" or "market dominance," but use them in a more pedestrian, non-legal sense. A "market" that an investor may care about may be quite different than an economic market for purposes of competition analysis.

[118] As discussed in further detail above, we have already concluded that Univision will not have an attributable interest in Entravision's radio stations. *Infra* ¶ 45.

[119] See n.107, *supra*.

[120] "Latino Viewing Choices: Bilingual Television Viewers and the Language Choices They Make," by Louis De Sipio, Ph.D., The Tomas Rivera Policy Institute ("Rivera Study") at 5.

available on broadcast television, cable, or satellite.[121] Consistent with the general market trend, we expect new cable channels geared to a Hispanic audience to be introduced in the future.[122]

61. Further, with respect to barriers to entry into the alleged Spanish-language market, the record suggests that competitors may enter and exit the market with relative ease. Using Arbitron figures, Univision alleges that 99 new Spanish-language radio stations were introduced between 2001 and 2002.[123] A separate review of the BIA Publications Media Access Pro database by Commission staff reveals that, during the last four years, approximately 163 full-service Spanish-language radio stations switched from an exclusive English-language format and approximately 77 full-service English-language radio stations switched from an exclusive Spanish-language format.[124] Although it is unclear how many of these format changes were the result of ownership changes, the record evidence, as well as the staff's own investigation of the issue, support the conclusion that barriers to changing a station's format do not preclude entry of new Spanish-language radio stations. Thus, even if there were a Spanish-language market, we would have no basis to conclude that this proposed transaction would translate into competitive harms.

62. With respect to the proposition that the proposed transaction will unreasonably undermine diversity of programming available to the Spanish-language community, SBS similarly has failed to make its case. Although the effective date of the new rules set forth in the *2002 Biennial Review Order* has been stayed by the 3rd Circuit Court of Appeals, the reasoning in that order remains pertinent. In that order, we clarified that our primary "diversity" concern relates to viewpoint diversity, *i.e.*, do one or a few owners have the ability to filter out certain messages or viewpoints.[125] Accordingly, our focus in reviewing the allegation that the transaction should be prohibited or conditioned on diversity grounds cannot be limited to its purported impact on viewpoint diversity provided by broadcast outlets, but must encompass all of the media outlets available to purveyors of viewpoints presumably targeted to Hispanics.

63. The record evidence does not demonstrate that the Hispanic audience lacks a diverse mix of local or national programming alternatives. The Rivera Study notes that "Latinos have a wider palette of television programming options than does the population as a whole."[126] Interestingly, the Rivera Study included respondents who claimed to be Spanish-dominant with weak English-speaking skills (as demonstrated by the fact that 80% of the respondents responded to the survey in Spanish).[127] "Fully

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[121] May 14, 2003, Letter of Univision Communications, Inc., at 4. Univision's assertion is based on a Hispanic Television Directory available at www.tvweek.com/hispanictv/.

[122] *See, e.g.*, "Lifestyle Programming: Scripps Plans Spanish-Language Cable Net On Its 'How-To' Model," *Broadcasting and Cable* (Sept. 23, 2002).

[123] May 14, 2003, Letter of Univision Communications, Inc., at 4.

[124] SBS's July 21, 2003, filing also shows that 35 existing stations have converted to a Spanish-language format in the top ten "Hispanic" markets over the last 3 years, which also indicates a significant potential for new entry. July 21, 2003, Letter of SBS, at 4.

[125] *2002 Biennial Review Order*, ¶¶ 19-35.

[126] Rivera Study at 1. One of the purposes behind the study was to explain the overwhelming bilingual viewing pattern in the Latino community.

[127] Id. at 3.

three-quarters of Latinos routinely watch television in English and Spanish," and "approximately two-thirds of respondents reported that children in the household preferred English-language programming while just 4 percent preferred Spanish-language programming."[128] Using Nielson and Arbitron data as support, Univision points out that "over 99% of all Hispanic television households in the United States watch one or more English-language broadcast networks;" that "[i]n the markets in which HBC's stations are located, an average of nearly two-thirds of all Hispanics listen to English-language radio stations;" and that "Hispanics spend the *majority* (53.4%) of their radio listening time listening to English-language formats."[129] For the majority of Spanish-speaking citizens, therefore, the range of available outlets includes both English and Spanish-language alternatives and is, in fact, broader than that available to the larger population.

64. Even if we were to narrow our focus to include only outlets that provide programming in Spanish, we would not be able to conclude that this proposed transaction would result in a single gatekeeper for diversity purposes. On the local level, there appears to be no dearth of new Spanish-language radio stations entering local markets,[130] and, as discussed above, more new radio stations have switched to the Spanish-language format over the last four years than have switched away from it.[131] Moreover, in communities with large Hispanic populations, it is not uncommon to find one or more local newspapers published in Spanish.[132] In addition, English-language programs can be broadcast in Spanish by use of the Secondary Audio Program (SAP).[133] According to Nielsen figures, SAP penetration, as defined by the percentage of households owning a SAP-capable device, has increased from 68.4% in June 2002 to 76.1% in June 2003.[134] As of August 2000, between one-third and one-half of the broadcast

[128] Id. at 1, 6. A 1998 study by the Tomas Rivera Policy Institute concluded that "[o]nly 26 percent of respondents watched the news exclusively in Spanish," and that "[a] roughly equal number watched the news primarily and exclusively in English." "Talking Back to Television: Latinos Discuss How Television Portrays Them and the Quality of Programming Options," by Louis DeSipio, Ph.D., Tomas Rivera Policy Institute (1998 Rivera Study), at 4. This contrasted sharply with entertainment programming, where just 20% of respondents watched in both English and Spanish. Id. at 5.

[129] May 14, 2003, Letter of Univision Communications, Inc., at 4 (emphasis in original). The authors of the Rivera Study suggest that "[t]he fact that bilingual Latino viewers are overwhelmingly made up of immigrants and, to a lesser extent, the children of immigrants indicates that, if current trends continue, U.S.-born Latinos will move away from bilingual viewing and Spanish-language television." Rivera Study at 11.

[130] According to the Neilsen figures cited by Univision, the number of Spanish-language radio stations has increased from 600 in 2001 to 699 in 2002. Arbitron, *Radio Today 2002 Edition and 2003 Edition*, 38, 48.

[131] See *Infra* ¶ 61.

[132] Spanish-speaking residents of New York and Miami, for instance, are served by general circulation newspapers *Hoy* and *El Nuevo Herald*, respectively. As noted recently in the *Washington Post*, Spanish-language newspapers will also be debuting in Dallas, Orlando, and Chicago. "Spanish-Language Media Expand," *Washington Post*, Page A1 (August 11, 2003). Many smaller cities, such as Lawrence, Massachusetts, are also served by Spanish-language newspapers.

[133] Telemundo has also recently announced that it will provide English-language closed captioning for its Spanish-language programming by September 2003. July 28, 2003, Communications Daily, at 12.

[134] The "relatively low levels of the use of SAP among respondents who had access to such technology indicates that these respondents do not perceive that they are short of Spanish-language programming options." Rivera Study at 10.

stations in the top 25 DMAs were already broadcasting on the SAP channel.[135] As a result, English-language networks and their local affiliates can reach a large proportion of Spanish speakers through either English-language programming or through the SAP channel. Nationally, the number of cable and satellite delivered programming services targeted at Spanish speaking viewers is large and growing.

65. There is, in sum, no shortage of media outlets available to Spanish speaking audiences in the United States. Given the wide variety of programming alternatives described above,[136] as well as Hispanic viewing habits and the ease of entry into the Spanish-language format, we simply cannot conclude that the Hispanic or Spanish-speaking audience constitutes a separate, insular "diversity" or competition market.

IV. CONCLUSION

66. Section 310(d) of the Communications Act provides that no station license shall be transferred or assigned until the Commission, upon application, determines that the public interest, convenience, and necessity will be served thereby.[137] In acting on such applications, we generally consider whether the proposed transaction will be consistent with the Communications Act and our rules and, in addition to complying with those rules, whether the transaction would otherwise serve the public interest.

67. We have reviewed the proposed merger and related pleadings and conclude that grant of the applications as conditioned herein will comply with the Commission's rules. As discussed in further detail above, we also conclude that the merger will not be anticompetitive or result in a lack of diversity and, therefore, will be consistent with the public interest. We conclude that the applicants are fully qualified and that grant of the transfer of control of HBC broadcast radio stations to Univision, subject to the conditions set forth in this order, will serve the public interest, convenience, and necessity.

68. Accordingly, IT IS ORDERED, That the Petition to Deny of the National Hispanic Policy Institute is GRANTED IN PART as set forth above, and is DENIED IN ALL OTHER RESPECTS; and That the informal objection of Elgin FM Limited Partnership is DENIED.

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[135] *See Implementation of Video Description of Video Programming*, 15 FCC Rcd 15230, 15238-15239 (2000) (noting availability of Spanish-language audio on the SAP channel for several programs carried by each of the four major networks).

[136] See *Infra* ¶ 60.

[137] 47 U.S.C. § 310(d).

69. IT IS ORDERED, That the applications for consent to the transfer of control of licensee subsidiaries of Hispanic Broadcasting Corporation, applications BTC, BTCH, BTCFTB-20020723ABL-ADS and the additional authorizations listed in Note 1, the Appendix, or otherwise, and as docketed under MB 02-235, ARE GRANTED, conditioned upon the representations made by Univision in the applications and related amendments regarding its interest in Entravision; upon divestiture of radio stations in Albuquerque and Houston, as may be necessary to come into compliance with the rules adopted by the Commission in its *2002 Biennial Order*, or a showing that waiver of those rules is appropriate, within six months in the event that the stay pending appeal in *Prometheus Radio Project v. Federal Communications Commission*, No. 03-3388 (3d Cir. Sept. 3, 2003) (per curiam) is lifted or the local radio ownership rules adopted in the *2002 Biennial Review Order* otherwise go into effect; upon notification of the Commission should the Consent Decree between Univision and the U.S. Department of Justice expire, terminate, or otherwise be amended; and upon further requirements relating to ownership compliance that the Commission may impose as a result of the changed circumstances reported in such notification.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene Dortch

Secretary